Lian Chen Fah @ Lian Chen Lee & Ors v Gimo Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4(S5)–24–1104 OF 2001
TENGKU MAIMUN JC
8 AUGUST 2007

Evidence — Expert evidence — Need for — Two different surveyor's report — Plaintiff applied for court appointed expert — Failure by defendant to cross examine court appointed expert report — Whether court appointed expert report conclusive

Tort — Damages — Trespass to land — Defendant denied admission on liability and contended that whatever was agreed to be done was merely on the basis of goodwill as they were neighbours — Whether trespass proven

It was the case of the plaintiffs that the defendant had trespassed and encroached into the plaintiffs' property and that the construction activities of the defendant had caused damage to the plaintiffs' property. As regards the boundaries of the plaintiffs and the defendant's properties, in view of the dispute and given two different plans by the plaintiffs' surveyor and the defendant's surveyor on the boundaries, the court made an order on 17 October 2002, pursuant to an application by the plaintiffs under O 40 of the Rules of the High Court 1980, that the Pentadbir Tanah dan/atau Pengarah Ukur Wilayah Persekutuan be appointed as the court expert and to furnish his written reports to the court. The defendant did not object to the appointment of court expert and neither had the defendant applied to the court to cross-examine the court expert on his report. The court expert's report acknowledged that the surveyor appointed by the defendant had admitted to the encroachment by the defendant and concluded that there was in fact an encroachment by the defendant of the plaintiffs' property and that the report which had been prepared by the plaintiffs' surveyor was more accurate. Despite not mounting any challenge to the court expert's report, the learned counsel for the defendant submitted that the report of the court expert was inconclusive. As for the plaintiffs claim for damages, the learned counsel for the defendant argued that the plaintiffs had failed to substantiate their allegations that the damage were the result of the defendant's construction work.

Held, allowing plaintiff's application:

(1) It was the court's view that the plaintiffs had proven their case for encroachment. Not having objected to the application by the plaintiffs for the appointment of the court expert and not availing themselves of the opportunity to cross-examine the court expert, it was too late in the day for the defendant to contend that the court ought to look at the report with caution. After all, the very basis for the appointment of the court expert was for the just, expeditious and economical disposal of the action (see *Abbey National Mortgages plc (formerly CIBC Mortgages plc) v Key Surveyors Nationwide Ltd and Ors* [1995] 75 BLR 124). To ignore the court expert's report would render the court order and the appointment of the court expert an exercise in futility (see para 8).

(2) In so far as the damage to the plaintiffs' property was concerned a letter written by the defendant's architect to the defendant's contractor dated 31 January 1997, the defendant had admitted the encroachment and to the damage caused and had agreed to rectify the damage. The liability of the defendant for the damage to the plaintiffs' property had been established (see paras 9–10).

[Bahasa Malaysia summary

Ini adalah kes plaintif-plaintif berkenaan dengan defendan telah mencerobohi dan memasuki hartanah plaintif-plaintif dan bahawa kegiatan-kegiatan pembinaan oleh defendan telah menyebabkan kerosakan kepada hartanah plaintif-plaintif. Berhubungan dengan sempadan-sempadan hartanah-hartanah plaintif-plaintif dan defendan, memandangkan terdapat pertikaian dan memandangkan terdapat dua pelan-pelan berlainan oleh juru ukur plaintif-plaintif dan juru ukur defendan akan sempadan-sempadan tersebut, mahkamah telah membuat satu perintah pada 17 Oktober 2002, berikutan permohonan plaintif-plaintif di bawah A 40 Kaedah-kaedah Mahkamah Tinggi 1980, bahawa Pentadbir Tanah dan/atau Pengarah Ukur Wilayah Persekutuan dilantik sebagai pakar mahkamah dan untuk membekalkan laporan-laporannya kepada mahkamah. Defendan tidak membantah perlantikan pakar mahkamah dan juga tidak memohon kepada mahkamah untuk memeriksa balas pakar mahkamah atas laporannya. Laporan pakar mahkamah melaporkan bahawa juru ukur yang dilantik oleh defendan telah mengakui terdapat pencerobohan oleh defendan dan memutuskan bahawa sebenarnya terdapat pencerobohan oleh defendan di hartanah plaintif-plaintif dan bahawa laporan yang disediakan oleh juru ukur plaintif-plaintif adalah lebih tepat. Walaupun tidak mengemukakan cabaran terhadap laporan pakar mahkamah tersebut, peguam bijaksana untuk defendan menghujahkan bahawa laporan pakar mahkamah adalah tidak muktamad. Berhubungan dengan tuntutan plaintif-plaintif untuk kerosakan,

peguam bijaksana defendan menghujahkan bahawa plaintif-plaintif telah gagal membuktikan dakwaan bahawa kerosakan tersebut adalah disebabkan oleh kerja-kerja pembinaan defendan.

Diputuskan, membenarkan permohonan plaintif:

(1) Ia adalah pandangan mahkamah bahawa plaintif-plaintif telah membuktikan kes mereka untuk pencerobohan. Dengan tidak membantah permohonan plaintif-plaintif untuk melantik pakar mahkamah dan dengan tidak menggunakan peluang untuk memeriksa balas pakar mahkamah, ia sudah terlalu lewat untuk defendan menegaskan bahawa mahkamah sepatutnya mengambil laporan tersebut dengan berhati-hati. Lagipun, tujuan asas melantik pakar mahkamah adalah untuk penyelesaian tindakan kes secara adil, cepat dan menjimatkan (lihat *Abbey National Mortgages plc (formerly CIBC Mortgages plc) v Key Surveyors Nationwide Ltd and Ors* [1995] 75 BLR 124). Dengan tidak menghiraukan laporan pakar mahkamah akan menyebabkan perintah mahkamah dan perlantikan pakar mahkamah satu usaha yang sia-sia (lihat perenggan 8).

(2) Sejauh mana terlibat kerosakan kepada hartanah plaintif-plaintif satu surat yang ditulis oleh arkitek defendan kepada kontraktor defendan bertarikh 31 Januari 1997, defendan mengakui pencerobohan dan kerosakan yang dilakukan dan telah bersetuju membaiki kerosakan tersebut. Liabiliti defendan untuk kerosakan kepada hartanah plaintif-plaintif telahpun dibuktikan (lihat perenggan 9–10).]

Notes

For cases on need for expert evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1480–1481.

For cases on trespass to land, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 245–249.

Cases referred to

Abbey National Mortgages plc (formerly CIBC Mortgages plc) v Key Surveyors Nationwide Ltd and Ors [1995] 75 BLR 124 (refd)

Legislation referred to

Rules of the High Court 1980 O 40

Toh Chia Hua (AL Chew & Cik Chua Ai Li with him) (Azman, Davidson & Co) for the plaintiff.

Mong Chung Heng (Shern Delamore & Co) for the defendant.

Tengku Maimun JC:

[1] The plaintiffs were the registered proprietors of land known as Lot 225, Seksyen 89, Mukim Ampang, Kuala Lumpur and a house built thereon (the plaintiffs' property) which is situated adjoining to the defendant's land known as Lot 247, Seksyen 89, Mukim Ampang, Kuala Lumpur (the defendant's property).

[2] Sometime in March 1995, the defendant commenced construction works on the defendant's property to build three storey eight units of apartments. It is the case of the plaintiffs that the defendant had trespassed and encroached into the plaintiffs' property and that the construction activities of the defendant had caused damage to the plaintiffs' property. This resulted in the filing of this action whereby vide the amended originating summons the plaintiffs are seeking for the following reliefs:

(1) Suatu deklarasi bahawa kawasan tanah berukuran 19 meter persegi yang terletak di antara sempadan Lot 225, yang dipegang di bawah Geran 4004 yang luasnya berukuran 2,024.8 meter persegi (21,794 k.p) Seksyen 89 Mukim Ampang, Kuala Lumpur ('hartanah tesebut') dan Lot 226/Lot 247, Seksyen 89, Mukim Ampang, Kuala Lumpur ('Hartanah Defendan') sepertimana yang diwarnakan kuning dan ditandakan 'A' di dalam Lampiran 1 yang dilampirkan bersama ini dan ditunjukkan di atas Pelan No JEA4161/98/DIC adalah sebahagian hartanah tersebut;

(2) suatu deklarasi bahawa kawasan tanah berukuran 16 meter persegi yang terletak di antara sempadan hartanah tersebut dan jalan laluan menuju masuk ke hartanah defendan dan di antara hartanah tersebut dan Persiaran Ritchie sepertimana yang diwarnakan biru dan ditandakan 'B' di dalam Lampiran 1 yang dilampirkan bersama ini dan ditunjukkan di atas Pelan No JEA4161/98/DIC adalah sebahagian hartanah tersebut;

(3) bahawa defendan dengan segera merobohkan dinding tahan (retaining wall) yang terletak di antara hartanah tersebut dan hartanah defendan yang diwarnakan hijau dan ditandakan 'C' di Lampiran 1 yang dilampirkan bersama ini dan membinanya semula di atas sempadan yang diwarnakan oren dan ditandakan 'D' di dalam Lampiran 1 yang dilampirkan bersama ini dan ditunjukkan di atas Pelan No JEA4161/98/DIC;

(4) bahawa defendan dengan segera merobohkan pagar yang dibina oleh defendan yang terletak di antara hartanah tersebut dan jalan laluan menuju masuk ke hartanah defendan dan di antara Hartanah tersebut

dan Persiaran Ritchie sepertimana yang diwarnakan ungu dan ditandakan 'E' di dalam Lampiran 1 yang dilampirkan bersama ini dan membinanya semula di atas sempadan sepertimana yang diwarnakan merah dan ditandakan 'F' dalam Lampiran 1 yang dilampirkan bersama sini dan ditunjukkan di atas Pelan No JEA4161/98/DIC;

(5) bahawa defendan memindahkan segala sampah-sarap, tanah atau apa-apa bahan yang digunakan oleh defendan untuk kerja-kerja pembinaan daripada hartanah plaintif;

(6) kerugian am untuk ditaksirkan;

(7) kos;

(8) relif lanjut atau lain yang dianggap sesuai dan berpatutan oleh mahkamah yang mulia ini.

[3] Vide the affidavit in support, the plaintiffs have exhibited several letters that have exchanged between the parties and averred that the defendant had admitted the encroachment and to the damage caused and had agreed to rectify the damage which the defendant had however failed to do. The defendant denied any admission on liability and contended that whatever was agreed to be done was merely on the basis of goodwill as they were neighbours.

[4] As regards the boundaries of the plaintiffs and the defendant's properties, in view of the dispute and given two different plans by the plaintiffs' surveyor and the defendant's surveyor on the boundaries, the court made an order on 17 October 2002, pursuant to an application by the plaintiffs under O 40 of the Rules of the High Court 1980, that the Pentadbir Tanah dan/atau Pengarah Ukur Wilayah Persekutuan be appointed as the court expert. The court expert was to carry out the investigation and survey on the boundaries of the plaintiffs' property and the defendant's property to determine whether there was any encroachment by the defendant into the plaintiffs' property; to investigate and determine the accuracy of the report and plan prepared by both the plaintiffs and the defendant and to furnish his written reports on the above to the court.

[5] It is to be noted that the application by the plaintiffs for the appointment of the court expert was not objected to by the defendant and neither had the defendant applied to the court to cross-examine the court expert on his report. The court expert's report was tendered through En Jasni bin A Rahman, Timbalan Pengarah Ukur Wilayah Persekutuan which was marked as encl 10 in the court file. In essence the report acknowledged that the surveyor appointed by the defendant had admitted to the encroachment by the defendant and concluded that there was in fact an encroachment by

the defendant of the plaintiffs' property and that the report which had been prepared by the plaintiffs' surveyor was more accurate. A

[6] In view of the court expert's report, the learned counsel for the plaintiffs submitted that the plaintiffs claim is clear and pray for order in terms of the application in the originating summons. B

[7] The learned counsel for the defendant submitted primarily that the plaintiffs' application ought not to be allowed as the boundary could not be verified and that there was no conclusive proof that the defendant had encroached into the plaintiffs' property. Despite not mounting any challenge to the court expert's report, the learned counsel for the defendant submitted that the report of the court expert was inconclusive and should be looked at with a pinch of salt. As for the plaintiffs claim for damages, the learned counsel for the defendant argued that the plaintiffs have failed to substantiate their allegations that the damage were the result of the defendant's construction work. The learned counsel for the defendant further submitted that the letters exhibited by the plaintiffs where the defendant had allegedly admitted to the damage done were 'Without Prejudice' and hence could not be used against the defendant. The learned counsel prayed in the alternative that the plaintiffs' originating summons be converted into writ since there is a dispute of fact as to the plans and the boundaries of the plaintiffs' and the defendant's properties. C D E

[8] It is my view that the plaintiffs have proven their case for encroachment. Not having objected to the application by the plaintiffs for the appointment of the court expert and not availing themselves of the opportunity to cross-examine the court expert, it is too late in the day for the defendant to contend that the court ought to look at the report with caution. After all, the very basis for the appointment of the court expert is for the just, expeditious and economical disposal of the action (see *Abbey National Mortgages plc (formerly CIBC Mortgages plc) v Key Surveyors Nationwide Ltd and Ors* [1995] 75 BLR 124). To ignore the court expert's report would render the court order and the appointment of the court expert an exercise in futility. Above all, there is no reason for the court not to accept the finding in encl 10 that there was in fact encroachment by the defendant of the plaintiffs' property given the defendant's surveyor's own admission as to the encroachment. F G H

[9] In so far as the damage to the plaintiffs' property is concerned a letter written by the defendant's architect to the defendant's contractor dated 31 January 1997 (exh WCY 5 encl 2) reads: I

> We refer to the joint inspection to the neighbouring house on 23 January 1997 and would like to confirm that you have agreed to complete the laying of proposed roadside kerb and repair works to the existing boundary's fence which was

damaged during the construction of the access road by 2 February 1997. Our client has also confirmed in the subsequent site meeting held on 30 January 1997 that the damaged boundary's fencing belong to the neighbour shall be removed and replaced by 5'0' height PVC coated chain link fencing.

In addition, we would also like to summarise herewith the list of works that were required to be carried out to the neighbour's house.

(A) Internal Works

(1) Patch up crackline on wall at living room, bedroom and bathroom (ground floor) and repaint wall where necessary.

(2) Seal off cracking on jointing of terrazzo floor tiling at living room (ground floor).

(3) Rectify roof leekage adjacent to the gable end and touch up painting on ceiling.

(B) External Works/Gable End

(1) Render new plaster and apply weathershield paint to the external wall of gable end.

(2) Realign the roofing tiles at the edge of eaveline and complete it with mortar lining.

(3) Seal off the exposed underside of eaveline with superflex ceiling board fixed on timber batten.

You are also to propose the method of tidying up the asbestos roofing tiles jutted out from the neighbour's house without jeopardizing the stability of the existing roof structure.

Kindly furnish us the work programe for distribution to the neighbour for their acceptance prior to proceed with the rectification works.

[10] It is my view that given the encroachment by the defendant into the plaintiffs' property whilst the construction activities were in progress and in the light of the above said letter, the liability of the defendant for the damage to the plaintiffs' property had been established. Based on the foregoing I had allowed the application by the plaintiffs as prayed.

Plaintiff's application allowed.

Reported by Sally Kee